

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

Slush Puppie Limited,

Plaintiff/Counterclaim Defendant,

Case No. 1:19-cv-189

v.

Judge Michael R. Barrett

The ICEE Company,

Defendant/Counterclaim Plaintiff.

ORDER

This matter is before the Court on Plaintiff Slush Puppie Limited's Fed. R. Civ. P. 12(b)(1) Motion to Dismiss (Doc. 187) The ICEE Company's Counterclaims and First Amended Counterclaims, which will be denied as moot.

As background, on February 6, 2023, the Court held oral argument on Plaintiff's Motion for Leave to File a Second Amended Complaint to Withdraw Certain Causes of Action (Doc. 72), ICEE's Motion to Amend its Counterclaims (Doc. 152), Plaintiff's Motion for a Protective Order Regarding the Slushy Jack's Brand (Doc. 158), and ICEE's Motion for Summary Judgment (Doc. 175) on Plaintiff's Twelfth Claim for Relief in its Amended and Supplemental Complaint. Ruling from the Bench, the Court granted Plaintiff's Motion for Leave (Doc. 72), ICEE's Motion to Amend (Doc. 152), and ICEE's Motion for (Partial) Summary Judgment (Doc. 175) but denied Plaintiff's Motion for a Protective Order (Doc. 158).¹ (02/07/2023 Minute Entry and NOTATION ORDER & Hearing on Motions

¹ Defendant ICEE's Motion for Sanctions (requesting sanctions in the form of judgment on all Counts of Plaintiff's Amended Complaint (Doc. 27) and for an award of attorneys' fees and costs) (Doc. 73) and Defendant ICEE's Motion for Sanctions (in the form of an award of attorneys' fees and costs against the Benesch law firm as well as individual attorneys Mark E. Avsec, Elizabeth R. Emanuel, Matthew D. Gurbach, Ronald L. House, Jennifer M. Turk, and Eric L. Zalud) (Doc. 89) were taken under advisement. (02/07/2023 Minute Entry and NOTATION ORDER & Hearing on Motions Transcript, Doc. 185 PAGEID 6343 (105:22)).

Transcript, Doc. 185 PAGEID 6343 (105:7–21)). Written orders issued on March 16, 2023. (Docs. 189, 190).

During the February 6 oral argument, and in connection with its Motion for a Protective Order (Doc. 158), Plaintiff challenged the Court’s subject-matter jurisdiction as to ICEE’s Lanham Act counterclaims² to its then-operative Amended Complaint³. (Hearing on Motions Transcript, Doc. 185 PAGEID 6278–6284 (40:19–46:15), PAGEID 6321–6323 (83:23–85:9)). Plaintiff followed with its Rule 12(b)(1) Motion (Doc. 187) on March 7, 2023.⁴ Then, in accord with the Court’s March 16, 2023 Order (Doc. 190) Granting Plaintiff’s and Defendant’s Respective Motions to Amend and Denying Plaintiff’s Motion for a Protective Order, Plaintiff filed its Second Amended Complaint (Doc. 191) and ICEE filed its Answer and Counterclaims (Doc. 194) to Plaintiff’s Second Amended Complaint. Plaintiff has since filed a Motion to Strike (Doc. 199) ICEE’s “As-Filed Amended Counterclaims” to its Second Amended Complaint as well as a Motion to Dismiss (Doc. 201) ICEE’s “Amended Counterclaims” under both Rule 12(b)(1) and 12(b)(6) on April 17, 2023.

An amended pleading supersedes the original one. Thus, ICEE’s Counterclaims (Doc. 194) to Plaintiff’s Second Amended Complaint supersede its Counterclaims (Doc. 29) to Plaintiff’s Amended Complaint. Plaintiff’s (original) Rule 12(b)(1) Motion to Dismiss is, therefore, moot. *See Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, No. C-1-08-603, 2009 WL 3029661, at *3 (S.D. Ohio Sept. 16, 2009) (citing

² (Doc. 29 PAGEID 515–520 (¶¶ 122–145, ¶¶ 146–152)).

³ (Doc. 27).

⁴ (Hearing on Motions Transcript, Doc. 185 PAGEID 6296 (58:7–13) (By Mr. Wolfsohn, appearing for ICEE: “Then they should, you know, file actual motion – here we are, we raised the Lanham Act in January of 2020, so three years later, and now for the first time they are raising it at this hearing. Yeah, they should have raised it three and a half years ago. We could have briefed it and we’d be done by now, and Your Honor would have ruled. But, anyway, let’s brief that issue on Lanham Act[.]”)).

Yates v. Applied Performance Techs., Inc., 205 F.R.D. 497, 499 (S.D. Ohio 2002)). Accordingly, Plaintiff Slush Puppie Limited's Fed. R. Civ. P. 12(b)(1) Motion to Dismiss (Doc. 187) The ICEE Company's Counterclaims and First Amended Counterclaims is **DENIED AS MOOT.**⁵

IT IS SO ORDERED.

/s/ Michael R. Barrett
JUDGE MICHAEL R. BARRETT

⁵ Plaintiff Slush Puppie Limited's Fed. R. Civ. P. 12(b)(1) and 12(b)(6) Motion to Dismiss (Doc. 201) The ICEE Company's Amended Counterclaims **REMAINS PENDING**.